Justice Centre
for Constitutional Freedoms

# Refusing to Refer
## *Charter* Protection for Physicians' Conscience Rights

A legal analysis of the constitutionality of the *Draft Statement on Physician Assisted Dying*

Submitted to the College of Physicians and Surgeons of Manitoba

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John Carpay, B.A., L.L.B. and R. Jay Cameron, B.A., L.L.B.

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# Introduction

On October 15, 2015, the College of Physicians and Surgeons of Manitoba ("CPSM") released its *Draft Statement on Physician Assisted Dying* (the "*Statement*") in light of the Supreme Court of Canada's decision in *Carter v. Canada (Attorney General)*, 2015 SCC 5 ("*Carter*"). In the "Scope of the Statement," the CPSM affirms that the *Statement* applies to all physicians.[1]

The unilateral imposition of the *Statement* on all Manitoba physicians without exception necessitates the highest level of scrutiny to ensure that it does not violate the rights enshrined in the *Charter of Rights and Freedoms* (the "*Charter*"), in particular *Charter* section 2(a) freedom of conscience and religion.

The *Statement* contains a number of ambiguities and contradictions that create a great deal of uncertainty for physicians who may not wish, for one reason or another, to facilitate physician assisted suicide. In addition, the *Statement* disproportionately focuses on patients to the exclusion or diminishment of physicians' legal and constitutional rights. It is for this reason that we posit that the *Statement* cannot be said to comply with the *Charter*. If challenged in Court, we anticipate the offending portions of the *Statement* would be found to be void.

# Issues

This paper focuses on the "Requirements" as set out on page 2 of the *Statement*, as well as CPSM's *Statement 181*.

The issues can be succinctly described as follows:

1. Ambiguities and contradictions regarding the freedom of physicians not to refer for physician assisted dying;
2. Ambiguities regarding the prohibition against "imposing" moral or religious views on patients, and the conflicting requirement to explain moral or religious beliefs as the reason for not performing physician assisted suicide; and
3. Failure to account for the *Charter* rights of physicians, and focusing disproportionately on the "rights" of patients to legal treatment options.

# Analysis

Insofar as these issues outlined above overlap within the *Statement*, this paper undertakes a wholesale analysis of the issues, as they are intertwined in the *Statement* itself.

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[1] *Statement* at page 1.

The *Statement*'s basic requirements of conduct are entitled "I. Minimum Requirements of All Physicians".[2] For ease of reference they are reproduced below.

**REQUIREMENTS**

**I. Minimum Requirements of All *Physicians* (the "Minimum Requirements")**

A. Physicians must not impede patients' access to physician assisted dying or impose their moral or religious beliefs about physician assisted dying on patients.

B. A physician who elects not to provide or participate in physician assisted dying for any reason is not required to provide it or participate in it **or to refer** the patient to a physician who will provide physician assisted dying to the patient.

C. When a physician receives a request from a patient to provide or participate in providing physician assisted dying to that patient or to be referred to another physician who will, if that physician elects not to provide or participate in providing physician assisted dying to the patient that physician must:

1. disclose his/her objection to providing or participating in physician assisted dying to the patient; and

2. provide the patient with timely access to another member or resource (footnote: resources may include but are not limited to other health care providers, counsellors and publicly available resources for physician assisted dying) that will provide accurate information about physician assisted dying (footnote: CPSM Statement 181 Members Moral or Religious Beliefs not to Affect Medical Care); and

3. continue to provide care unrelated to physician assisted dying to the patient until that physician's services are no longer required or wanted by the patient or until another suitable physician has assumed responsibility for the patient; and

4. make available the patient's chart and relevant information (i.e., diagnosis, pathology, treatment and consults) to the physician(s) providing physician assisted dying to the patient when authorized by the patient to do so; and

5. provide a copy of this Statement to the patient.

Paragraph 2 of the Minimum Requirements contains a footnote to *Statement No. 181* of the CPSM entitled "Members [*sic*] Moral or Religious Beliefs Not to Affect Medical Care" ("*Statement 181*").

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[2] *Statement* at page 2.

*Statement 181* is reproduced here:

> 1. A member must communicate clearly and promptly to a patient or prospective patient about any treatment or procedure that the member chooses not to provide because of his or her moral or religious beliefs.
>
> 2. A member must not withhold information about the existence of a procedure or treatment even if providing that procedure or treatment or giving advice about them conflicts with his or her moral or religious beliefs.
>
> 3. A member must not promote his or her own moral or religious beliefs when interacting with a patient.
>
> 4. If the moral or religious beliefs of a member prevent him or her from providing or offering access to information about a legally available medical treatment or procedure, the member must ensure that the patient who seeks that advice or medical care is offered timely access to another member or resource that will provide accurate information about all available medical options. [3]
>
> **A statement is a formal position of the College with which members shall comply.** [Emphasis added]

It should be noted at the outset that the term "physician assisted dying" should not be confused or mistaken with the palliative care of individuals who are terminally ill. The term "suicide" does not appear in the *Statement*. It appears that when the College uses the term "physician assisted dying", the College is actually referring to "physician assisted suicide", which many physicians object to for moral and ethical reasons. It must also be remembered that the Supreme Court of Canada in *Carter* dealt with a constitutional challenge to the *Criminal Code* prohibition against **assisting a person to commit suicide**. There was not, and is not, a *Criminal Code* prohibition against "assisting a person who is dying."

The Justice Centre for Constitutional Freedoms ("JCCF") has substantial and grave concerns about the apparent conflict and uncertainty in the provisions in the Minimum Requirements and *Statement 181*.

Paragraph B of the Minimum Requirements appears to codify the right **not** to refer a patient who wishes to access physician assisted dying:

> A physician who elects not to provide or participate in physician assisted dying for any reason is not required to provide it or participate in it **or to refer** the patient to a physician who will provide physician assisted dying to the patient. [Emphasis added]

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[3] *Statement 181* at page 1.

A plain reading of Paragraph B of the Minimum Requirements recognizes the right not to refer patients to physicians who will, or who are known to be willing, to assist patients in committing suicide.

However, paragraph A of the Minimum Requirements states that a physician **must not impede a patient's access to physician assisted dying.** "Impede" is not a defined term under the *Statement*, leaving the door open to the possibility that a refusal to refer could constitute "impeding access". This ambiguity is troubling. It negates the ostensible protection for physicians' *Charter*-protected conscience rights that would exist if the *Statement* was limited only to upholding the physician's freedom **not to refer** a patient for physician assisted suicide. Thus, in one paragraph is the right not to refer, while in another is the creation of a positive duty not to impede. It is not difficult to envision a circumstance where a non-referral is interpreted as "impeding", with associated disciplinary consequences.

A second apparent contradiction exists between paragraphs 1 and 3 of *Statement 181* states:

> 1. A member must communicate clearly and promptly to a patient or prospective patient about any treatment or procedure that the member chooses not to provide **because of his or her moral or religious beliefs.** [Emphasis added]
>
> 3. A member **must not promote his or her own moral or religious beliefs when interacting with a patient.**

Again, it is not difficult to envision a scenario where the requirement to explain why a physician chooses not to assist with physician assisted dying because of moral or religious beliefs could be interpreted as "promoting" those same beliefs, contrary to paragraph 3, above.

The following dialogue is used as an illustration:

> **Physician A:** I understand that you are interested in physician assisted suicide. I cannot personally perform that option for you, nor can I refer you to someone who can, due to my ethical and moral convictions on the subject.
>
> **Patient B:** What do you mean, moral convictions, I don't understand.
>
> **Physician A**: I'll try to explain. I have taken the Hippocratic Oath to uphold life. One of the passages in the oath reads thus: "Nor shall any man's entreaty prevail upon me to administer poison to anyone; neither will I counsel any man to do so." Consequently, in my view, it would be contrary to my moral obligations to assist a patient to purposefully end his life. The oath says that this is prohibited. I view my oath as a sacred obligation. Here is the CPSM *Statement* on the matter.
>
> **Patient B:** (reviews *Statement*) Spare me your moral qualms. You are not in the pain I am in, and I didn't ask to be preached to. I want to speak to your superior. I

> am aware that you are not entitled to promote your moral beliefs to me or impede my access to treatment. The *Statement* says so.

Despite being devoid of any "religious" content, the line between explaining why a physician has a moral objection to physician assisted suicide and promoting a particular moral belief is easily blurred. Moreover, the intentions of the physician may be misunderstood by the patient, who does not want to be "preached at". The existing *Statement* provides no guidance on navigating the difference between the two intents (that of explaining ethical considerations and that of promoting them), if indeed there is a meaningful difference at all.

If there is no meaningful difference between the two purposes, or the difference is exceedingly difficult to comprehend (and thus comply with) it would be struck down by a Court for vagueness. These provisions fail to create a fair, reasonable and intelligible standard for physicians to comply with.

To further compound the ambiguity, paragraph 4 of *Statement 181* states:

> 4. If the moral or religious beliefs of a member prevent him or her from providing or offering access to information about a legally available medical treatment or procedure, **the member must ensure that the patient who seeks that advice or medical care is offered timely access to another member or resource that will provide accurate information about all available medical options**. [Emphasis added]

It seems to be apparent from the foregoing that the *Statement* imposes a requirement to refer a patient, despite the protection in paragraph B of the Minimum Requirements to the contrary. The original Hippocratic Oath obliged a physician to swear not to give anyone poison, "**neither will I counsel any man to do so.**" Some physicians may believe (and understandably so) that the "offering of timely access to another member or resource that will provide accurate information" about physician assisted suicide to be tantamount to "counseling any man [to administer poison]". Again, no clarity is offered by the *Statement* in this regard.

## The Moral Practice of Medicine

Similar to the Hippocratic Oath, the Canadian Medical Association *Code of Ethics* also promotes the ethical practice of medicine, exhorting physicians to "[r]esist any influence or interference that could undermine your professional integrity", "[r]efuse to participate in or support practices that violate basic human rights" and "[r]ecommend only those diagnostic and therapeutic services that you consider to be **beneficial** to your patient or to others."[4] [Emphasis added]

The Physician's Oath in the Declaration of Geneva[5] provides further examples of the importance of morality and ethics to the practice of medicine:

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[4] Available at http://policybase.cma.ca/dbtw-wpd/PolicyPDF/PD0 Co4-06.pdf.

[5] Available at http://www.wma.net/en/30publications/10policies/g1/.

> I solemnly pledge to consecrate my life to the service of humanity;
>
> I will give to my teachers the respect and gratitude that is their due;
>
> I will practise my profession with conscience and dignity;
>
> The health of my patient will be my first consideration;
>
> I will respect the secrets that are confided in me, even after the patient has died;
>
> I will maintain by all the means in my power, the honour and the noble traditions of the medical profession;
>
> My colleagues will be my sisters and brothers;
>
> I will not permit considerations of age, **disease or disability**[6] creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or any other factor to intervene between my duty and my patient; [Emphasis added]
>
> **I will maintain the utmost respect for human life**; [Emphasis added]
>
> I will not use my medical knowledge to violate human rights and civil liberties, even under threat;
>
> I make these promises solemnly, freely and upon my honour.

The Declaration of Geneva is based on the grave concerns arising from the purely experimental use of medical knowledge and training during the Second World War by Nazi Germany and Imperial Japan, unhinged from guiding values of religion, ethics, and morality.

Courts, physicians and the Canadian Medical Association recognize that you cannot remove morality from medicine. For example, the Ontario Court of Appeal in *Flora v. Ontario Health Insurance Plan,* 2008 ONCA 538 ("Flora") relied upon the testimony of Dr. Peter Singer, an Ontario professor of medicine, a bio-ethicist and the Director of the University of Toronto Joint Centre for Bioethics. Dr. Singer had testified at trial that "the appropriateness of a proposed medical treatment for a particular patient is 'not purely a medical concept'. To the contrary, 'a physician's determination about whether treatment is appropriate includes not only medical facts like the projected chance of success but also ethical considerations.'"[7] The Court also noted that "[i]n their evidence before the Board, Mr. Flora's U.K. doctors and Dr. Wall also confirmed that ethical considerations form an essential part of medical decision-making concerning patient selection for a LRLT [a living-related liver transplantation]."[8] In the case before it, the Court found, that "the thesis that the appropriateness of a LRLT turns solely on its medical efficacy brushes aside the centrality of ethical considerations in transplant decision-making."[9]

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[6] Statement at page 1.
[7] *Flora,* at para. 75.
[8] *Flora,* at para. 75.
[9] *Flora,* at para 76.

Government bodies such as the CPSM should promote and encourage the ability of physicians to practise medicine with a free conscience. Attempting to draw a line in medical practice between the required "clinical" and the optional "moral" (which can be, but need not be, informed by religious beliefs) is misguided if not dangerous. Science can inform physicians as to what dosage of which drug will end the patient's life. Science provides no guidance as to whether killing a patient, or helping a patient commit suicide, is right or wrong, or under what conditions. A physician who is guided only by science, to the exclusion of conscience and ethics could be seen by terminally ill patients and their families as inherently untrustworthy.

In summary, the JCCF is concerned that the *Statement* is far from clear vis-à-vis the rights of physicians and the CPSM's accommodation of a physician's rights regarding his or her moral, religious, and ethical convictions. Further, the *Statement* contradicts itself on key provisions. It also disproportionately focuses on the provision of available treatment options without providing the proper safeguards for the rights of physicians. We cannot but conclude that it would be improper and indeed illegal (legally actionable) to discipline a member based on the existing *Statement*.

## The *Charter* protects freedom of conscience and religion for physicians

Foundational principles concerning freedom of religion were laid down by the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*: [10]

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. … The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. *If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.* … [C]oercion includes indirect forms of control which determine or limit alternative courses of conduct available to others…
>
> *What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not ... be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority*". [Emphasis added]

Medicine is one of many public spheres in which an individual can choose to work. The fact that a person provides services to the public, and the fact that some or all of those services are paid for directly or indirectly by government, does not remove *Charter* protection from individuals who

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[10] *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 336-37 [*Big M Drug Mart*].

serve the public. In particular, a person providing services to the public does not lose her *Charter* section 2(a) freedom of conscience and religion.

## The government's duty to accommodate physicians

The *Statement* notes that physicians are expected to **ensure that the patient who seeks that advice or medical care is offered timely access to another member or resource that will provide accurate information about all available medical options.**

Yet the *Statement* is strangely silent when it comes to CPSM's legal duty to accommodate physicians, in particular physicians' *Charter*-protected conscience and religious rights. CPSM must accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.[11] The minimizing or disregard of physicians' rights contravenes the provisions of the *Charter*.

## Accommodation is required under employment law

Acting in a capacity that is substantively similar to that of an employer, the College and the Manitoba Government have a legal duty, imposed by the *Charter*, to accommodate the conscientious and religious beliefs of physicians.

Employers must reasonably accommodate their employees to the point of undue hardship. A seminal case on "reasonable accommodation" was *Ont. Human Rights Comm. v. Simpsons-Sears*,[12] where the complainant, Mrs. O'Malley, was a member of the Seventh-day Adventist Church. Simpson-Sears required her to work on Saturdays, contrary to her religious faith, which required her to observe the Saturday Sabbath.

The Court introduced the concept of reasonable accommodation as follows:

> The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer.[13]

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[11] *Big M Drug Mart Ltd.* at 336.
[12] *Ont. Human Rights Comm. v. Simpsons-Sears* [1985] 2 SCR 536 [referred to as "*O'Malley*"].
[13] *O'Malley* at para. 23.

## Accommodation is required by the *Charter*

Accommodation is not limited to employment matters, but can be found in *Charter* jurisprudence relating to section 1 of the *Charter*, under which government must justify its violation of rights and freedoms if it wants its law or policy to be upheld. The concept of accommodation will apply even to otherwise valid policies or legislation where there is interference with a *Charter* or human right.

In *Multani v. Commission Scolaire Marguerite- Bourgeoys*, [2006] 1 S.C.R. 256 ("*Multani*") the Supreme Court found there to be a logical correspondence between the legal principles of the duty to accommodate from employment law and the minimal impairment test under s. 1 of the *Charter*.[14] The Court described the duty to accommodate as "a duty to make reasonable accommodation for individuals who are adversely affected by a Policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it."[15]

The Supreme Court of Canada in *Carter*, in finding that the government prohibition on assisted suicide violated patients' *Charter* section 7 rights to life and security of the person in certain circumstances, specifically warned about compelling physicians to participate in assisted suicide:

> In our view, **nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying.** The declaration simply renders the criminal prohibition invalid. What follows is in the hands of the physicians' colleges, Parliament, and the provincial legislatures. However, we note — as did Beetz J. in addressing the topic of physician participation in abortion in *R. v. Morgentaler* — that a physician's decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief (pp. 95-96).[16] [Emphasis added]

To justify its violation of a *Charter* right or freedom under section 1 of the *Charter*, the government must show that its law or policy is a "limit prescribed by law." With such subjectivity in the terms of the provisions in the Minimum Requirements and *Statement 181*, it is doubtful whether the *Statement* could even qualify as a "limit prescribed in law". A reasonable doctor would not have certainty about what procedures and practices are, or are not, required by the *Statement*.

One can argue that ensuring a patient has access to all legal medical procedures is a sufficiently pressing and substantial objective to justify violating physicians' conscientious and religious rights. However, the fact remains that patients do not have a *Charter* right to obtain from every physician whatever medical service they may desire. Conversely, physicians *do* have a *Charter* right to act on, and be guided by, their moral, ethical or religious beliefs, without this freedom being violated by a government body like the CPSM.

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[14] *Multani* at paras. 52-53.
[15] *Multani* at para. 53.
[16] *Carter* at para 132.

The direct violation of many physicians' *Charter* freedom of conscience and religion outweighs the benefits, if any, that may result from requiring **all** physicians to refer for life-ending or other controversial treatments rather than permitting physicians to abstain due to conscience. In the relevant context, i.e. in which controversial medical services are made available for those who desire them, there is no rational connection to support a requirement that **every** doctor be available to perform, or refer for, every health service.

## There is no *Charter* right to health services

The *Charter* places no obligation on the government to provide people with health care, even of a minimum standard.[17] In *Flora*,[18] the Court upheld the validity of a regulation that specifically denied Mr. Flora funding for the life-saving treatment that he needed. Mr. Flora had scraped together $450,000 to save his life through treatment in the United Kingdom. He unsuccessfully sought reimbursement for from the Ontario government. The Ontario Court of Appeal rejected the argument that "s. 7 imposes a positive obligation on the state to provide life-saving medical treatments."

If the *Charter* does not require the government to provide even **life-saving** treatments to patients, then the *Charter* certainly does not give patients a right to demand that every physician make herself or himself available to provide or refer for, life-ending or other controversial medical services. We respectfully suggest it might be well for CPSM to consider the foregoing in a redraft of the existing *Statement*.

## Conclusion

Significant ambiguities in the *Statement* need to be addressed in regards to physicians' *Charter* rights, and the contradictory requirement to explain moral or religious beliefs in relation to the prohibition on imposing or promoting moral or religious beliefs. Moreover, the *Statement* fails to properly recognize the government's duty to accommodate the moral, ethical and religious beliefs of physicians, which results in the College taking a dismissive approach to physicians' *Charter* rights, and infringing those rights in the name of encouraging access to health services.

As has been shown, no patient has a "right" to health services, whereas a physician has *Charter* rights in regards to the provision of services. The *Statement* fails to properly address either.

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[17] See *Chaoulli c. Québec (Procureur général)*, 2005 SCC 35 [*Chaoulli*] at para. 104: **"The *Charter* does not confer a freestanding constitutional right to health care"**; [emphasis added] *Gosselin c. Québec (Procureur général)*, 2002 SCC 84 at para. 81: "Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to *deprive* people of these."

[18] *Flora* at paras. 93, 108: "On the law at present, the reach of s. 7 does not extend to the imposition of a positive constitutional obligation on the Ontario government to fund out-of-country medical treatments even where the treatment in question proves to be life-saving in nature."

We submit that the above issues should be addressed in a revision to the *Statement* prior to it coming into force in February 2016.

## About the Authors

John Carpay was born in the Netherlands, and grew up in British Columbia. He earned his B.A. in Political Science at Laval University in Quebec City, and his LL.B. from the University of Calgary. Fluent in English, French, and Dutch, John served the Canadian Taxpayers Federation as Alberta Director from 2001 to 2005, advocating for lower taxes, less waste, and accountable government. Called to the Bar in 1999, he has been an advocate for freedom and the rule of law in constitutional cases across Canada. As the founder and president of the Justice Centre for Constitutional Freedoms (JCCF), John has devoted his legal career to defending constitutional freedoms through litigation and education. He considers it a privilege to advocate for courageous and principled clients who take great risks – and make tremendous personal sacrifices – by resisting the unjust demands of intolerant government authorities. In 2010, John received the *Pyramid Award for Ideas and Public Policy* in recognition of his work in constitutional advocacy, and his success in building up and managing a non-profit organization to defend citizens' freedoms. He serves on the Board of Advisors of iJustice, an initiative of the Centre for Civil Society, India.

R. Jay Cameron earned a Bachelor of Arts in English from Burman University in Alberta, and an LLB from the University of New Brunswick. After articling at a large national law firm and being called to the bar in 2008, Jay worked for the Attorney General of British Columbia as a provincial Crown Prosecutor for two years. His varied practice included bail hearings, *Charter* Applications, and prosecuting dangerous driving offenses, sexual assaults, and other violent crime. He returned to Alberta and civil litigation in 2012, and has since appeared at every level of Court in Alberta, as well as the British Columbia Supreme Court. In addition to criminal law, Jay's extensive and varied litigation practice has included construction, oil and gas, child protection, real estate, family, insurance, land development, personal injury, defamation and constitutional law (*Boissoin v. Lund*, Alberta Court of Queen's Bench, 2009; freedom of expression). Jay joined the JCCF as a staff lawyer in 2015, working on all of the JCCF's litigation files.

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*"Never doubt that a small group of thoughtful, committed people can change the world. Indeed, it is the only thing that ever has."*

The free and democratic society which the *Canadian Charter of Rights and Freedoms* holds out as our ideal can only be fulfilled by honouring and preserving Canada's rich and strong traditions of freedom of speech, freedom of religion, freedom of association, private property rights, constitutionally limited government, the equality of all citizens before the law, and the rule of law. And yet these core principles of freedom and equality continue to be eroded by governments and

by government-funded and government-created entities such as universities and human rights commissions.

The Justice Centre for Constitutional Freedoms (JCCF) was founded for the purpose of advancing and promoting the core principles of freedom and equality through education and litigation. The JCCF is a registered charity (charitable registration number 817174865-RR0001) and issues official tax receipts to donors for donations of $50 or more. The JCCF is funded entirely by the voluntary donations of freedom-minded Canadians who agree with the Centre's goals, mission, vision and activities. The Centre is independent and non-partisan, and receives no funding from any government or government organization. The JCCF provides *pro bono* legal representation to Canadians whose constitutional freedoms are threatened by government or its agents.

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Justice Centre for Constitutional Freedoms
#253, 7620 Elbow Drive SW
Calgary, Alberta, T2V 1K2
Phone: 403-475-3622
www.jccf.ca